Supreme Court U. S.
FILED
OCT 31 1899
JAMES H. McKENNEY,
Clerk

No. 248.

Brf. of Steele, Guthrie & Beecher, for Appellee.

STAMP TAX ON EXPRESS RECEIPTS.
WAR REVENUE LAW OF JUNE 13, 1898.

Filed Oct. 31, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

BRIEF FOR APPELLEE.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
THEODORE S. BEECHER,
Of counsel for appellee.

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BRIEF FOR APPELLEE.

The cause comes before this court on a certificate from the United States Circuit Court of Appeals for the Second Circuit requesting instructions upon the following questions of law:

"(1) Does the war-revenue act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest or other evidence of receipt, required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

(2) If the war-revenue act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?" (Record, page 1.)

Since July 1, 1898, when this provision of the War Revenue Act took effect, the express company has quoted its rates plus the war-revenue stamp, and has required the shipper as a condition of accepting goods for transportation, either to provide or pay for the cost of the stamp on the bill of lading or receipt issued therefor in addition to the customary rates previously charged for the service.

The suit is for an injunction to restrain the express company from refusing to accept express packages from appellant for transportation, except upon compliance with this condition. The right to such relief, it was claimed, arose under the terms of the Act, which, the appellant insisted, imposes the tax exclusively upon the express company, and not only requires its payment by the express company in the first instance, but by implication prohibits the company from reimbursing itself for such tax by exacting payment thereof from the shipper.

The company contended, on the other hand:

(1) That the Act does not require payment of the tax by the company even in the first instance, but on the contrary provides explicitly that it may be paid indifferently by either the carrier or the shipper.

(2) That even if the Act required payment by the company in the first instance, it did not in express terms prohibit the company from relieving itself of the expense by adding the tax to the rates previously charged.

(3) That consequently the company was entitled to collect the tax from the shipper as part of its charge, for its right to fix its own charges was not abrogated by the statute.

The court below dismissed the bill on the ground that the War Revenue Act contained no provision limiting the carrier's common-law right to freedom of contract,

in respect to its charges for carriage, and that in the absence of an express provision no inhibition could be inferred. The plaintiff thereupon appealed to the Circuit Court of Appeals for the Second Circuit, where, after consideration and submission of briefs by counsel, the questions of law above stated were certified to this court for instructions.

The questions presented, while of little consequence to the appellant, are of vital importance to the express companies. Even the appellant, who conducts one of the largest department stores in the city of New York and is consequently among the largest shippers of express packages in the United States, at a liberal estimate would have to pay only about $350 a year, an item that would not be perceptible in the enormous business transacted, and which besides would naturally be collected from his customers and thus become still more widely distributed and consequently less oppressive. But to the express companies the case is one involving almost their existence. It is estimated that this tax will aggregate annually over $1,600,000, or nearly three per cent. upon the entire aggregate capital of all the express companies, amounting to $55,000,000. It will amount to from thirty to fifty per cent. of the entire net profit from the express business. In the case of the particular package tendered by the appellant, it would have amounted to nearly fifty per cent. of the net profit. It is doubtful whether the business could survive such a burden. To sustain the appellant's contention it must be held that Congress has seen fit, under the guise of an act to provide revenue, but for no apparent reason, to single out the express companies for the imposition of what would in effect amount

to a tax of from thirty to fifty per cent. of their net income from the express business.

It is submitted that such an extraordinary conclusion will not be accepted unless the language of the Act is so plain as to leave no possibility of escape.

What possible motive can be ascribed to Congress for imposing upon the express companies such an unreasonable proportion of the common burden of the war. The purpose of the Act was "to provide ways and means to meet war expenditures." Surely, this purpose was fulfilled when the necessary revenue was provided. It would be in no respect better served by denying to any class the inherent right of shifting the burden in accordance with the immemorial usages and customs of trade and business. It is no doubt the duty of the legislature, in determining upon a method of taxation for such a purpose, to select that which will be least oppressive and most fairly and equitably distribute the burden, and it will be presumed that such was the intention of Congress in the present instance. That duty is best fulfilled by the widest possible distribution of this tax among the public, and not by concentrating its burden upon the express companies.

In *Cooley on Taxation*, 2d Ed., p. 265, it is said:

> "In the construction of the revenue laws, special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and all legislative action is entitled to the presumption that this has been intended. We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax

law were, *first*, the providing a public revenue, and, *second*, the securing of individuals against extortion and plunder under cover of the proceedings to collect the revenue."

So long as the revenue is provided, it is a matter of indifference to the government upon which party to the taxed transaction the burden finally remains. And such has been the view officially announced by the government and adopted by the Federal Courts. In a letter of the Attorney-General addressed to counsel for the express companies, in answer to the direct question, it is said:

"Replying to your letter of the 13th inst. I have the honor to advise you that the attitude taken by the Department of Justice with reference to the question as to which party, the shipper or the Express Company, under the war revenue bill, is required to furnish and pay for the revenue stamp which is required to be placed upon the manifest or bill of lading, is that this is a matter entirely between the shipper and the company. This office holds that so far as the Government is concerned it is only interested to know that the lawful tax is paid. As between the shipper and the Express Company, I have decided that the matter is not within my province of consideration under any case that has as yet arisen. The United States District Attorneys are instructed by this office that they may prosecute for the prescribed penalty any company which issues a manifest or bill of lading without the prescribed stamp; but that in controversies arising between shippers and express companies as to which one shall be required to bear the expense of the stamp, the Government has no direct concern under the war revenue law."

Letter of Attorney-General, Aug. 16, 1898.
Treasury Decisions (1898), No. 19,803, p. 234.
Treasury Decisions (1898), No. 19,833, p. 275.
U. S. v. Southern Express Co., U. S. Dist. Court for the Western District of North Carolina, October 27, 1898, unreported.

It has not been deemed necessary or useful to follow out and answer in detail the extended printed argument filed on behalf of the appellant. No attempt will there-

fore be made in this brief to reply categorically to the numerous propositions advanced, but the discussion will be confined to the questions upon which we submit the determination of the case must rest.

The argument divides itself naturally under the following heads:

I. The origin and nature of stamp taxes as indicating an intention that the tax should be widely distributed.

II. The indirect nature of the tax and the consequent presumption that it may be shifted so as to be borne ultimately by the consumer.

III. The proper interpretation of the Act.

IV. The right of the carrier to freedom of contract in respect of its charges for carriage.

I.

Of the origin and nature of stamp taxes.

By the political economists, stamp taxes, or stamp duties as they are more commonly termed, have uniformly been considered as belonging to the class of indirect taxes.*

They appear to have had their origin in Holland. In the struggle against the power of Spain, the States General had imposed every familiar form of tax, and finding them all unsatisfactory offered a reward to any one who would devise a new and practicable tax. The result was the invention of stamp duties by a private individual whose name is unknown. The system proved to be a very efficient method of taxation, for the taxes were at the same time inexpensive to collect, and were easily borne because widely distributed. Stamp duties were subsequently adopted

*E. R. A. Seligman, "Essays in Taxation," pp. 10, 11, 204; Adam Smith, "Wealth of Nations," Bk. V., Ch. II., Part 2, Art. 2, Appendix; J. S. Mill, "Principles of Political Economy," Bk. V., Ch. II.; C. F. Bastable, "Public Finance," p. 333; Leroy-Beaulieu, "Précis d'Economie Politique," p. 377; "Political Science Quarterly," September, 1898, p. 442.

in France and England, and have ever since continued in use as the most efficient means of obtaining revenue with the least unpopularity. They are not imposed upon any particular class, but upon transactions of commercial life, and those transactions are usually selected which are of most general and consequently most frequent occurrence. Thus not only is a large revenue obtained, but at the same time a wide distribution of the burden is accomplished.*

Stamp taxes in the United States have been coincident with all important wars, except the Mexican War, and were evidently resorted to on those occasions because of the sudden necessity of the Government for a largely increased revenue, and the desire that the burden of the war should be distributed as widely and equally as might be among the whole people and not imposed upon any particular class.†

The distinguishing characteristics of stamp duties thus appear to be that they provide a large revenue; that they bear upon no particular class, and that they accomplish the widest possible distribution of the burden.

It must require clear and direct language, therefore, to show that this Stamp Act was intended to impose a tax on the express companies, and not, as it purports, a general tax upon express receipts. Had Congress intended to tax the express companies or their business as is insisted in appellant's brief, there was no

* "History of Taxation and Taxes in England," S. Dowell, London, 1884, Vol. II., p. 62, Vol. III., pp. 322–3. "Treatise on Taxation and the Funding System," J. R. McCulloch, London, 1845, pp. 287–8. "Seligman's Essays on Taxation," pp. 10, 11.

† "An Act Laying Duties on stamped Vellum, Parchment and Paper." Laws 1797, Ch. XI.

"An Act Laying Duties on Notes of Banks," &c. Laws 1813, Ch. LIII.

"An Act to Provide Internal Revenue," &c. Laws 1862, Ch. CXIX.

"An Act to Provide Ways and Means to Meet War Expenditures," &c. Laws 1898.

need to resort to any such clumsy or roundabout method. The common form of exacting a percentage of their gross receipts could have been adopted, as was done in another section of the same Act in the case of the sugar companies and oil companies (War Revenue Act, Sec. 27), or if it was preferred to measure the tax by the number of shipments, periodical returns of all shipments could have been required, and the payment in a lump sum of a tax of one cent for each, as was done in the case of the telephone companies. The fact that resort was had to the device of a stamp tax—which is always intended to generalize the burden—demonstrates that there was no intention of imposing a tax upon the express companies or their business, but that it was contemplated that the tax should be imposed solely upon the express receipt which represents the transaction of shipment and so be distributed among the immense number of shippers, thus bearing but lightly upon any one person.

It is plainly requisite for the successful collection of a stamp tax that the transaction should be one evidenced by an instrument capable of being stamped, and, consequently, the transactions selected for such taxation are usually those which necessarily involve the creation of a document of some kind, to which a stamp may be readily affixed. Instances are found in checks, drafts, certificates of deposit, telegraph messages, written agreements, warehouse receipts, &c. In all these cases, the transaction cannot take place without the creation of the instrument, and in effect the instrument is the transaction. Hence the tax upon the instrument is a tax upon the transaction.

In none of the cases suggested does the law impose the tax upon either party to the transaction, but upon the transaction itself, leaving it to the agreement of the

parties, or the customs and usages of trade, to determine by whom it shall first be paid, and upon whom it shall ultimately rest.

But there are numerous transactions of frequent occurrence not necessarily evidenced by any document, *e. g.*, sales of stock certificates endorsed in blank, merchandise, etc. Such sales may be accomplished orally, and are completed by delivery of the thing sold, without any writing to which stamps could be affixed. Therefore, having determined to tax such transactions, it became necessary for Congress to make it obligatory on one party or the other to create a document evidencing the transaction, upon which a stamp might be affixed. Accordingly, the Revenue Act requires a memorandum of sale to be prepared in each case, and a stamp to be affixed thereto.

And so in respect of the express shipments selected for taxation. Such transactions are of very frequent occurrence, and by imposing a very small tax upon each, a large revenue could easily be raised which, being widely distributed, would be oppressive to no one. But it was not at all certain that in each case of shipment a bill of lading or receipt would be issued, and therefore difficulty might occur in collecting the tax, for the reason that there was no document which could be stamped. Consequently, a provision was embodied in the law making it the duty of every express company to issue a bill of lading or receipt in every instance in which it accepts a package for transportation, so that there should be always created a document evidencing the transaction and capable of being stamped. This was the sole purpose of the provision. It was not intended to determine who should pay the tax or who should affix the stamp, but solely to insure the

creation of a document upon which the stamp could be conveniently placed. The only object of the government was to secure the payment of the tax by some one. So long as the revenue was received, it was a matter of indifference to the government by which party to the transaction it was paid.

The fact, then, that the tax is in form a stamp tax, fairly raises a presumption against the claim that it was intended to be imposed on the express companies.

II.

Of the indirect nature of the tax.

Taxation generally, it may be said, is of two kinds; direct, where the requisition is addressed to the very person to be burdened; indirect, where the resources of the country in mass are reached through impositions upon the transactions of commercial life. This classification is recognized as existing in the scheme of taxation provided by the Constitution (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 557; 158 U. S. 601, 619).

As this court said in the Income Tax Cases (157 U. S. 429, 557):

> "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax after more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

As pointed out above, stamp taxes fall under the head of indirect taxes, which, to sum up many definitions, do not fall upon an indicated class of persons, but, being collected through the medium of trade, commerce and manufacture, are paid by such of the whole people as avail themselves of the results of those transac-

tions.* It may be noticed here in passing that the proposition of the appellant's counsel that the stamp tax upon express receipts is not within the class of indirect taxes, but is a direct tax imposed upon the express company with a prohibition against its reimbursement from its shippers, argues his client out of court for this would compel the conclusion that the tax was unconstitutional for want of apportionment among the states.

It is of the very nature of an indirect tax that its burden should be shifted. It is never intended that such a tax should be borne ultimately by the one on whom it is imposed in the first instance. As stated by Mr. Mill:

> "Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."
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> Principles of Pol. Ec., Book V., Ch. II., § 1.

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes."
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> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

Such has been history of excise taxes and duties ever since they were invented. The importer collects the duty which he has to pay the government by exacting a higher price for his goods; the distiller collects the revenue tax by imposing an additional charge upon his consumers; the tobacco manufacturer recoups himself for

*J. L. Laughlin, Elements of Political Economy, (1887), pp. 273, 274; C. F. Bastable, Public Finance, p. 333; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

the governmental charge put upon his business by making his customers pay a higher price for the manufactured article; and here the carrier would undoubtedly be compelled to increase its rates if it had to bear the tax itself. All such taxes are borne at last by the consumer as an incident in the cost of the article which he consumes; and, indeed, where such taxes are imposed upon the manufacturer or importer it has been held by this court that they become, when paid, an element in the value of the article, and the seller or manufacturer may lawfully impose upon his customers an additional charge to recoup himself for the tax which he has been obliged to pay to the government (*Jones* v. *Van Benthuysen*, 103 U. S. 87; *United States* v. *American Tobacco Co.*, 166 U. S. 468, 476; *Ammidown* v. *Freeland*, 101 Mass. 303; *Cooley on Taxation*, p. 164.)

Precisely the same consideration would apply if the tax under consideration were expressly imposed upon the express companies. It would then become an item in the cost and value of such service, which the company would be entitled to collect from its shippers, just as the manufacturer collects from his customers the tax paid upon his tobacco.

Such has been the experience of other countries where similar taxes are imposed. Professor Seligman makes the following statement as the result of his researches (*Seligman's Essays in Taxation*, p. 204):

> "But the old 'tax on public conveyances'—a percentage on the fare—which dates from the last century, was extended in 1855 to the receipts from passengers and from express traffic. In practice, this 'public conveyance' or transportation tax is not a direct tax on the corporations, but an indirect tax on passengers and on consignors of express packages; for the tax is added to the price of the ticket or receipt and is paid by the individual."

It is not unusual to provide for the collection of such taxes by constituting the company a tax gatherer or instrumentality of collection, and in effect putting upon it the responsibility of seeing that the tax is paid by its patrons. And this has been held to be the proper construction even of acts which by their terms call for payment by the company. The substance and not merely the form of the act must be considered. As Chief-Justice Marshall said in *Brown* v. *State of Maryland* (12 Wheat. 419, 444):

> "But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.
>
> It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

In *Crandall* v. *State of Nevada* (6 Wall. 35), the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach or other vehicle engaged or employed in the business of transporting passengers for hire" and that the proprietors, owners and corporations so engaged should pay the said

tax of one dollar for each and every person so conveyed or transported from the state. For the purpose of collecting the tax another section required a monthly report from all persons or corporations engaged in the business and the payment of the tax to the Sheriff or other proper officer. The court said, at page 39:

> "It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.
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> "If the act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person traveling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the state by any railroad or stage coach; and the remaining provisions of the act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage coaches, are made responsible for this, and so become the collectors of the tax."

In the *Case of the State Freight Tax*, 15 Wall. 232, the court said at page 273:

> "Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their own roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the

> freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State treasury is, in effect, only a tax-gatherer."

So, in the present Act, the tax is levied by Section 6 upon the various instruments mentioned in Schedule A, but payment is left to be made by either party to any of the transactions evidenced by such instruments. In order that some one shall be required to see that the tax is paid upon each express shipment, there are subsequent provisions which require the carrier to issue a bill of lading or receipt in every instance where goods are accepted for transportation, and yet another section imposes a severe penalty if the carrier shall permit a bill of lading or receipt to be issued without payment of the tax. By these provisions, the carriers are constituted the agents of the government for the collection of the tax, and the revenue of the government is thus assured.

Very similar in principle are the cases arising under laws which impose a tax upon the interest or dividends paid by a company, and which require the company to pay the tax, but authorize its deduction from the interest or dividend paid to the creditor or stockholder respectively. It is held that such taxes are not upon the company, but in reality are a tax upon the creditor or stockholder—so much so that, where a municipal corporation was the creditor to whom the interest was payable, it was held that the tax could not be collected from the railroad company, because, while in form imposed upon the company, it was in substance imposed upon the creditor; and the creditor being a municipal corporation could not be taxed (*U. S.* v. *Railroad Co.*, 17 Wall. 322, 327; *Stockdale* v. *Insurance Cos.*, 20 Wall. 323, 329, 330; *Henderson et al.* v. *Mayor of N. Y. et al.*, 92 U. S. 259,

274; *Brown* v. *Maryland*, 12 Wheat. 419, 444). The cases of *Barnes* v. *The Railroads*, 17 Wall. 294, *Bailey* v. *Railroad Co.*, 22 Wall. 63, and *Railroad Co.* v. *Slack*, 100 U. S. 659, relied upon by the appellant, are not in conflict with this view.

Again the fact that the tax is levied indiscriminately upon all receipts without regard to the nature of the shipment, its value, the distance carried, or the amount received by the carrier indicates that the tax is intended to be upon the transaction and nothing else. It is similar in principle to the tax under consideration in the *Case of the State Freight Tax* (15 Wall. 233.) There a tax of two cents was imposed upon each two thousand pounds of freight carried. The court said at page 272:

> "Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it." * *

In *Telegraph Co.* v. *Texas*, 105 U. S. 460, the state enacted a law requiring every chartered telegraph company doing business in the state to pay a tax of one cent for every full-rate message sent, and one-half cent for every message less than full rate, the tax to be paid quarterly to the Comptroller of the state on sworn statements made by an officer of the company; and yet the court held that this was a tax on the telegraph messages, and not upon the company. At page 465 it was said:

> "The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs."

See, also, *Welton* v. *State of Missouri*, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Webber* v. *Virginia*, 103 U. S. 344; *State Tonnage Tax Cases*, 12 Wall. 204; *Peete* v. *Morgan*, 19 Wall. 581; *Cannon* v. *New Orleans*, 20 Wall. 577; *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238.

If the tax under consideration in the State Freight Tax case was held to be a tax on the freight "because carried," and the tax in the telegraph case a tax on the message "because sent," the tax on express receipts must be held to be a tax upon the shipment "because made."

Even if, therefore, the Act by its terms imposed the tax upon the express companies in the first instance, the presumption would be that this was only done as a method of collecting the tax and with the intention that the express companies should reimburse themselves from their shippers.

The situation of the express companies would be most grave if they were compelled to lose the amount of this tax. They are already subjected to unusually heavy state taxation (*Adams Express Company* v. *Ohio*, 165 U. S. 194; *Adams Express Company* v. *Kentucky*, 166 U. S. 171). The number of packages ordinarily shipped over the lines of The Adams Express Company alone exceeds 90,000 per day, or more than 28,000,000 of such packages per year. The tax upon this would be over $280,000, or nearly 2½ per cent. upon the nominal or par value of the $12,000,000 of capital of The Adams Express Company. Such a tax, if imposed on the express company, would be evidently unreasonable and excessive, but when borne by the shippers it becomes comparatively

trifling. As suggested above, what reasonable motive could be imputed to Congress for the imposition of such a burden upon the express companies? The purpose of the Act was to provide revenue and not to oppress or destroy any particular class or occupation. This purpose is fulfilled by a stamp tax which by the operations of business is distributed over the whole community. It would not be aided by a requirement which would prohibit such an equalization of the burden. The express business is reached, as is every other business, through the many indirect impositions of the Act. No justification can be shown for imposing upon them any different rule of contribution from the rest of the community.

It is stated in appellant's brief that railroad companies for the most part are paying the tax upon their bills of lading and not exacting it from the shippers. We are by no means prepared to admit that such is the fact, but if it were true it would be quite immaterial to this discussion. The express business differs radically from that of the railroads. It consists in forwarding a great many small packages, usually for short distances, so that the average charge per package is very small. Consequently, a tax of one cent for each package amounts to a large percentage of the gross revenue received.

The railroad business, on the contrary, for the most part covers heavy shipments and for long distances, so that the average rate received is so large that a tax of one cent upon each shipment is comparatively unimportant and may readily be assumed by the companies without serious loss or inconvenience. A tax of one cent upon an average rate of twenty-five or fifty cents might be very burdensome, although the same tax upon a rate of one or two hundred dollars might be insignificant.

III.

Of the proper interpretation of the act.

As pointed out above, even if the Act itself were silent on the subject, it would be a reasonable inference that the ultimate payment of a stamp tax such as that in question, imposed upon the transaction of shipment, was left to be regulated by agreement between the parties to the transaction, or by the usages and customs of business, as is the case with stamp taxes generally. But in this instance there is no room for mere inference, for an examination of the provisions of the Act will show conclusively that the question is not left open for construction, but it is provided in express terms that the tax may be paid indifferently either by the carrier or shipper.

The only section which imposes the tax is Section 6, which provides:

> "That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for and in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed *by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued*, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."
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> *Act of June 13, 1898, c. 448*, 30 Stat., p. 451.

In other words, all the stamp taxes upon documents mentioned in Schedule A may be paid by either the person who issues the document, which, in the case of express companies, would be the company, or by the person for whose use or benefit the document is issued, and that is, in the case of express shipments, the shipper. There is

no room for argument on this point. The provisions of the section are clear and unambiguous, and the appellant practically admits that if this provision stood alone no question could be made but that the tax was left to be paid indifferently by either the carrier or the shipper. The appellant, however, insists that the effect of the clause in Schedule A entitled "Express and Freight" is to abrogate the provisions of Section 6 in regard to the stamp tax on bills of lading, and, in terms, to impose the payment of this tax directly and exclusively upon the express companies. The clause in question is as follows:

> "EXPRESS AND FREIGHT: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."
>
> *Act of June 13, 1898, c. 448*, 30 Stat., p. 459.

Although clearly no tax is imposed by this section, the appellant nevertheless argues that inasmuch as it is thereby made the duty of the express company to *issue* a bill of lading or receipt, which bill of lading or receipt is required to bear a stamp, therefore it is the duty of the express company to bear the whole burden of the tax and

to affix and pay for the stamp which must be attached to the bill of lading or receipt *after* it is issued; for, the appellant insists, otherwise the instrument would not be legal, and it cannot be assumed that Congress would require the express company to issue an unstamped document for which it would be subject to penalty under the law. And it is urged that the effect of this clause is to override the plain provisions of Section 6, and to impose on the express company a duty in connection with the payment of this tax which does not attach to any other transaction included in Schedule A.

The question occurs at once, why, if this had been the intention of Congress, such an ambiguous (to say the least) form of expression should have been adopted, when it would have been easy to state plainly that the tax was intended to be borne by the express companies, as in the case of the tax on sleeping and parlor car companies, imposed by Section 28, where the language is, "the stamp to be affixed to the ticket and paid *by the company issuing the same;*" or, in the case of the matters referred to in Schedule B of the Act, in regard to which Section 20 provides that the stamps shall be *affixed by the person subject to the tax therein provided.* It would have been more natural, had such been the intention of Congress, to have used the same form of expression in regard to the affixing and payment of the stamp as was employed in regard to issuing the bill of lading or receipt, thus: "It shall be the duty of every * * express company * * to issue * * a bill of lading * * and to attach thereto and cancel a stamp, &c., &c." But it will be observed that, instead of adhering to the same form of language, a semicolon is inserted, and there is an entire change in the method of expression. The clause begins:

> "It shall be the duty of every * * express company * * to issue * * a bill of lading;" * *
>
> 30 Stat., p. 459.

Then follows a semi-colon, and after that, instead of saying "and it shall be the duty of such express company to attach and cancel the stamp," the Act changes to an impersonal form of expression and says:

> "and there shall be duly attached and cancelled, * * a stamp," &c.

Had Congress intended to impose on the express company the duty of attaching and canceling the stamp, as it had just imposed the duty of issuing the bill of lading, it is inconceivable that the form of expression would have been changed. Plainly, the change in expression must have been adopted for the deliberate purpose of expressing a different meaning—namely, that, while the duty of issuing the bill of lading devolved upon the carrier, the duty of attaching and canceling the stamp and paying the tax was left, like the other taxes enumerated in Schedule A, to be performed by either party to the transaction, as provided in Section 6.

But it is quite evident from other considerations that the clause is not susceptible of such a construction as the appellant asserts. His main reliance seems to be placed upon the concluding sentence, which provides that any failure to issue a bill of lading shall subject the carrier to a penalty of $50 for each offense; and it is argued that the words "such bill of lading" there employed mean a bill of lading with a stamp duly attached and canceled, and that, inasmuch as a penalty is imposed upon the carrier for failure to issue such a bill of lading, therefore by inference the intention must have been that the obligation both to issue and stamp the bill of lading was to rest upon the carrier.

This argument proceeds upon a false premise. It assumes that the penalty of $50 mentioned is intended to be imposed upon the carrier for failure *to affix and cancel the stamp* required to be put upon the bill of lading. But such is not the correct construction. This penalty is imposed, not for the failure to stamp the bill of lading, but for *failure to issue or create a bill of lading* which can be stamped. The failure to stamp is subject to a different and much more severe penalty, as will presently be pointed out. The purpose in attaching a penalty to the failure to issue or create a bill of lading or receipt, without regard to its being stamped or not, is evident. As pointed out above, it is essential to the successful collection of stamp taxes that a document be created evidencing the taxed transaction, in order that a stamp can be affixed thereto. Unless such a document is created, the transaction is not readily available for stamp taxes, but a tax must be imposed in some other way. So, when Congress determined to impose a stamp tax upon express shipments, it became necessary, in order to facilitate and ensure the collection of the tax, that a document should be created, upon which a stamp could be placed, and this was secured by imposing upon the carrier a penalty of $50 for each failure to issue a receipt for any shipment of goods accepted for transportation. The only and unmistakable object of this penalty was, therefore, to insure the creation of a document which could be stamped, and it was in no wise intended as a penalty for a failure to stamp the document *after* it had been brought into existence.

Much stress is laid by the appellant upon the use of the word "issue" in connection with the bill of lading; but plainly it is used in this connection in the sense of

create, and has no reference to the final delivery of a stamped instrument to the shipper. The correctness of this view is conclusively established by a reference to the debate in the Senate, where a colloquy took place between Senator Gorman and Senator Aldrich, who was in charge of the bill. The following occurred:

"MR. GORMAN. * * I read, beginning at line 10, on page 41:

"'Any failure to issue such bill of lading, manifest, receipt, or other memorandum shall subject such railroad company, carrier, express company, or corporation or person to a penalty of $50 for each offense.'

"MR. ALDRICH. The Senator from Maryland certainly misapprehends the language there or he has not read it carefully. That is the penalty for not issuing a bill of lading.

"MR. GORMAN. Yes.

"MR. ALDRICH. The penalty for not putting a stamp upon one when issued is a penalty which is applied in another way.

"MR. GORMAN. But it is the same thing precisely.

"MR. ALDRICH. I beg the Senator's pardon. That is simply a provision that every railroad company must issue a bill of lading, and failing to do that, it must pay a fine of $50. As to what the penalty shall be for failing to stamp it after issue is another question entirely."

Congressional Record, Vol. 31, p. 5627.*

It is thus apparent that this clause has reference merely to the issuance of the bill of lading, and that the issuance there referred to is the creation of the document, and has no connection with the question of affixing or paying for the revenue stamp thereon. The appellant's argument therefore falls to the ground; and, indeed, if correct it would result necessarily in a manifest absurdity. For precisely the same form of expression is used in the concluding paragraph of the sentence, where it says:

* As to the references to the debates as interesting although not controlling sources of information, see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 699; *Dunlap* v. *United States*, 173 U. S. 65, 75.

> " and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

Under the appellant's construction the words "such bill of lading" are to be interpreted as meaning a "stamped bill of lading," so that the clause would read:

> " Any failure to issue *such stamped bill of lading* * * shall subject such * * express company * * to a penalty of $50 for each offence, and no *such stamped bill of lading* * * shall be used in evidence unless it shall *be duly stamped* as aforesaid."

Such a result is nonsensical, and yet it is unavoidable if the appellant's contention be correct. The only reasonable interpretation of this clause must be, therefore, that it is made the duty of the express company to issue (or create) a bill of lading or receipt, that the amount of the tax thereon is fixed at one cent for each receipt, and that the express company is subject to a penalty of $50 if it accepts any shipment for transportation without issuing or creating a receipt therefor upon which a stamp may be conveniently affixed. Suppose the express company did issue an unstamped receipt, can any one imagine that this penalty of $50 could be imposed for that offense?

The correctness of this interpretation is conclusively shown by reference to other provisions of the Act. Sections 7 and 13 of the Act provide for the penalties to be imposed for issuing a receipt *unstamped*. Here we find not merely a penalty of $50, but under Section 7 the offense is made a misdemeanor punishable by a fine of not exceeding $100, and under Section 13, if committed with intent to evade the law, a fine of $50 and imprisonment not exceeding six months, or both, in the discretion of the court. This, of itself, makes it certain that the clause above quoted from Schedule A has no reference to the failure to *stamp* a bill

of lading *after* it is issued. The penalty here is a very different one, and much more severe than for the mere failure to issue a bill of lading. It is preposterous to assume that two such different consequences as the penalty provided in the express and freight clause, and the much more serious penalties provided in Sections 7 and 13 were intended to apply indifferently to one and the same offense.

In neither Section 13 nor in Schedule A, nor in Section 7 is there a single word indicating by whom the stamp shall be affixed, or by whom the cost thereof shall be defrayed. The impersonal form of expression is sedulously adhered to all through the Act. The utmost effect that can reasonably be claimed for Sections 7 and 13, is that, as pointed out above, they indirectly impose upon the carrier the responsibility of seeing that the stamp is paid before a bill of lading or receipt is finally issued and delivered to the shipper. They do not make it his duty to affix or pay for the stamp, but they do punish him for issuing a document without the same being stamped. From this appellant argues that the express company must pay for the stamp and itself affix it to the bill of lading or receipt. No such argument can be founded thereon. The law prohibits the transaction of shipment unless a bill of lading is issued and stamped; but nowhere in the law is there a word imposing upon the carrier the duty of supplying or affixing the stamp. The carrier is merely constituted a tax collector for the government (*Crandall* v. *State of Nevada*, 6 Wall. 35, 39; *State Freight Tax*, 15 Wall. 232, 273). If the carrier and the shipper cannot agree as to who shall bear the expense of this requirement of the law, the only result which must follow is that the transaction of shipment cannot occur. There is certainly no

more warrant for the shipper insisting that the carrier shall pay the tax than there is for the carrier to insist that the burden must be borne by the shipper.

The difference in the language employed in connection with the taxes imposed under Schedule B of the Act from that used in reference to Schedule A emphasizes the correctness of the interpretation above set forth. By the first paragraph of Section 6 it is provided that the taxes under Schedule A shall be paid *by either one or the other* of the parties to the transactions therein referred to; but in the second paragraph, which refers to the taxes provided in Schedule B, no such alternative provision is found. Again, we find in Section 13, which imposes penalties for infractions of Schedule A, that the impersonal form of expression is adhered to—that is to say, the penalty is imposed upon the person who shall issue a document, "*without the same being duly stamped*," and not upon the person issuing the document "*without stamping*." But when we come to Section 20, which imposes a penalty for failure to pay the taxes provided in Schedule B, a different form of expression is again used, and the law provides that "any person * * who shall make, prepare, and sell * * drugs, medicines, &c., * * upon which a tax is imposed by this Act, as provided for in Schedule B, *without affixing thereto* an adhesive stamp or label denoting the tax," shall be deemed guilty of a misdemeanor, &c. Here, again, the distinction, sedulously adhered to throughout the law, is emphasized and the proposition even more clearly demonstrated that, where the intention of Congress was to require payment of the tax specially by any one of the parties to a transaction, peculiarly apt language was employed to indicate its purpose.

Moreover, even if the Act contained a requirement that

the stamp should be affixed by the express company, that would not necessarily imply an intention that the tax represented by the stamp should be paid and borne ultimately by it. The affixing and canceling of the stamp is merely the method of collecting the tax. The real subject of the tax must be ascertained by a consideration of the purpose and effect of the Act as distinguished from its mere form (*Brown* v. *Maryland* and cases cited under Point II. above.)

In *Attorney-General for Quebec* v. *Queen Insurance Co.*, 3 App. Cas., 1090, the question arose as to the interpretation of the act of the legislature of Quebec, which required every assurer carrying on business in that province to take out a license each year. The act provided that the price of the license should consist in the payment to the Crown for the use of the province, at the time of the issue of the policy and at the time of the making or delivery of each premium, receipt or annuity, of a sum computed at the rate of three per cent. as to assurances against fire, or of one per cent. as to other assurances, for each $100 of the amount received as premium or renewal of assurance. Such payment was required to be made "by means of one or more adhesive stamps equivalent in value to the amount required, to be affixed by the assurer, his agents, officers or employees on the policies of insurance, receipt or renewal, as the case may be." In spite of this direct language of the act, the court held that, while in form the tax was a license tax, it was in reality merely an ordinary stamp tax to be paid by anybody who wanted a policy. At page 1098 the court said:

> "It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps and affixes them;

> or it may be that the assured buys the adhesive stamps and affixes them or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act."

Another and conclusive argument is found in Section 28 of the Revenue Act, which imposes a tax upon parlor and sleeping car companies. There no impersonal form of expression is employed as in the case of the express and freight clause, but the language is plain and direct:

> " the stamp to be affixed to the ticket and *paid by the company issuing the same.*"

If the result of the general language employed in the express and freight clause of Schedule A were to impose the tax there specified on the carrier, surely it would have been unnecessary to provide a separate section, entirely apart from Schedule A, to cover the tax upon the parlor and sleeping car companies. They could have been included much more consistently with the other transportation companies. But the very fact that Section 6 applied to *all* the stamp taxes provided for by Schedule A, and permitted their payment to be made indifferently by either party to the various transactions upon which the tax was laid, made it necessary to omit the parlor and sleeping car companies from that section of the Act, and to include them in a special section to which the provisions of Section 6 would have no application.

It is evident, therefore, that the appellant's argument has no foundation in the language of the express and freight clause, but is absolutely inconsistent with the whole scheme of the Act. It can be supported only upon the assumption that, although Congress had particularly in mind the subject of requiring payment of taxes by special parties to transactions, and provided for it in several instances, nevertheless in this particular instance it

deliberately abandoned the plain, simple and familiar language which would have made its purpose evident, and adopted a form of expression incapable of any such interpretation.

Reliance is placed by the appellant upon a comparison of the present Act with the former Stamp Acts of 1862–4 but that comparison so far as it is useful for any purpose, serves only to confirm the views above expressed.

The appellant has overlooked the essential difference between the two Acts. The tax imposed by the Act of 1862 was graduated, increasing with the carrier's compensation, thus indicating perhaps more of an intention that the tax in the first instance at any rate should be paid by the express company. But, more than this, by a separate section of the Act the companies were directly required to affix the stamp (Laws 1862, ch. 119, §105, 12 Stat. at Large, p. 478). The tax was found so burdensome and inconvenient that it was almost immediately changed to a tax on gross receipts (Laws 1863, ch. 74, § 10, 12 Stat. at Large, p. 722; Laws 1864, ch. 173, §104, 13 Stat. at Large, p. 276). It is hardly possible to conceive that if Congress now intended to tax the express companies it would again resort to the form of a stamp act which was found so burdensome and inconvenient as to compel its repeal in 1864.

A comparison of the two Acts strengthens the view that Congress deliberately altered the arrangement which existed under the Act of 1862, and included the tax upon express receipts under Schedule A so as to leave no room for the contention that anything was intended different from an ordinary stamp duty, to be paid, as provided by Section 6, like all the other stamp

duties covered by that section, indifferently by either party to the transaction.

The War Revenue Act was for a long time under discussion in Congress, and it is interesting and useful to observe the course of the discussion upon the various provisions, and particularly the statements of the members of the committee who were in charge of the bill, and the actual changes which were made in the Act from time to time. Thus, when the question was presented as to imposing a tax upon the checks or tickets given out by parlor or sleeping car companies for berths or seats, the section as proposed read as follows:

> "That from and after the 1st day of July, 1898, a stamp tax of one cent shall be levied and collected on every seat sold in a palace car and on every berth sold in a sleeping car, the stamp to be affixed to the receipt given for each seat or berth so sold."
>
> *Congressional Record*, Vol. 31, p. 6161.

It was objected that this provision did not require payment of the tax by the sleeping-car companies, but left it open to be collected either from the companies or their passengers, and that, in order to have the companies pay the tax the Act should contain a clear provision for that purpose. Accordingly, this section was amended so as to read as follows:

> "That from and after the 1st day of July, 1898, a stamp tax of one cent shall be levied and collected on every seat sold in a palace or parlor car and on every berth sold in a sleeping car, *the stamp to be affixed to the ticket and paid by the company issuing the same.*"
>
> *Congressional Record*, Vol. 31, pp. 6160, 6161.

It is evident that Congress here had clearly in mind the necessity of using plain and direct language, if it was desired that the tax should be paid in the first instance

specifically by one of the parties, and not indifferently by either.

Even more instructive are the debates in regard to the clause contained in the express and freight section itself, on which the appellant relies, providing that

> "but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment."
>
> *Act of June 13, 1898, c. 448*, 30 Stat., p. 459.

As originally drafted, the express and freight section did not contain this clause, but a committee of newspaper men made an earnest appeal to the committee in charge of the bill, urging that if some such clause were not inserted, the burden imposed by the law upon the publishers of newspapers would be very great, because of the great number of separate packages usually contained in one bundle in making shipments of newspapers by express. No suggestion was made by anyone that the express companies would have to pay this tax, but on the contrary the amendment was adopted at the request of the newspaper publishers and solely for their benefit.

Congressional Record, Vol. 31, pp. 6168, 6172.

It is evident, therefore, that Congress supposed and intended that this tax was to be paid not by the express companies, but by the shippers, for otherwise there would have been no reason for inserting the clause referred to above, and the newspaper publishers would simply have been told that the tax did not affect them, but was required to be paid by the carriers.

IV.

Of the carrier's right to freedom of contract in respect of its charges for carriage.

As suggested above, if the Act could be interpreted as imposing the tax exclusively upon the express com-

panies, they may nevertheless lawfully add the amount to their former customary rates or charges. The appellant by the force of this argument is driven to the untenable position that the War Revenue Act, not only must be construed as imposing a tax specially upon the express companies, as distinguished from a general stamp tax on express receipts, but that it must be held to contain an implied prohibition against the express company reimbursing itself for the tax by treating it as an expense of the business; in other words, that the carrier's common-law right to charge what it will, subject only to the limitation of reasonableness, is abrogated by the Revenue Act to the extent of the tax imposed upon express receipts, and that whether the carrier's rates were previously unreasonably high or low is not material, because, so the appellant argues, this law implies that the amount of the stamp tax must be deducted from the carrier's profits, and impliedly prohibits the carrier from relieving itself of that expense. It is submitted that the carrier's common law right to fix its own charges for carriage cannot be thus abrogated. It would require a direct, clear and positive enactment to warrant any such assumption as to the intention of Congress.

It should be observed that The Adams Express Company is not a corporation, but is a mere joint-stock association of individuals, analogous to a partnership (*Complaint*, paragraph II., record, page 3; *Chapman* v. *Barney*, 129 U. S. 677; *Taft* v. *Ward*, 106 Mass. 518; *Gregg* v. *Sanford*, 65 Fed. Rep. 151, 153; *Platt, etc.*, v. *Colvin et al.*, 50 Ohio St. 703). It enjoys no franchise, it exercises no powers granted by any state; it merely carries on a business which may be transacted by any individual, and there is no public duty imposed upon it any

more than the duty imposed upon every individual common carrier, to carry for all for a reasonable compensation. (*Defendant's answer*, paragraph VI., record, page 9.) What this compensation should be must depend upon all the circumstances going to make up the service rendered; but, even in the case of corporations whose only right to receive compensation is derived from legislative grant, it must always be sufficient to allow the carrier a reasonable profit (*Chicago, &c., Railway Co.* v. *Minnesota*, 134 U. S. 418 458; *Smyth* v. *Ames*, 169 U. S. 466, 546). Where the carrier is a private association whose right to compensation for services rendered depends upon no consideration of public grant, its right to fix the rates for such compensation is less restricted, and is limited only by the power of the states to prevent unreasonable charges.

But no issue is raised in this suit as to whether the charges of the express company, with or without the addition of the stamp tax, are reasonable or unreasonable. The defendant company's answer under oath alleges their reasonableness both before and since the passage of the War Revenue Act (record, p. 13). The appellant's contention seems to be that, without regard to any consideration of reasonableness or unreasonableness, the Act prohibits the company from exacting the payment of the stamp tax from the shipper in addition to the rates which it had been accustomed to charge for many years before.

Much emphasis is laid on the claim that the express company has not in form increased its rates, but that it continues to charge the same rate, and in addition exacts the tax from the shipper as a separate item. This is a mere play upon words. By whatever name it may be called, the fact is that since

July 1, 1898, the company has compelled the shipper to pay twenty-six cents for a service which prior to that date had been rendered for twenty-five; and so with all its other charges. The mere fact that the charge is collected in two items, instead of one, is of no importance.

In any view, it must be assumed for the purposes of this suit that the aggregate rate charged by the express company since July 1, 1898, is a reasonable rate, for the express company has collected from the shipper only the exact amount of additional expense which has been imposed upon express shipments by the Revenue Act. Even if the appellant's contention that this tax is imposed upon the company were correct, the company has merely added to its charge the additional expense created by the Act, and its profit in the transaction remains unchanged. If, therefore, its rates were reasonable prior to July 1, 1898, the addition of the amount of the stamp tax after that date cannot make them unreasonable. If the appellant's contention were to prevail, the express company would in effect be compelled to accept twenty-four cents as a reasonable rate for a service for which twenty-five cents had previously been conceded to be reasonable.

Some criticism has been made upon the method adopted by the express company of increasing its charges; and it has been said that, assuming that the tax is intended to be levied on the company and the company desired to increase the revenue from its business in order to meet the tax, it should have made a general readjustment of all its rates, and not add one cent to each, thus increasing a ten-cent rate ten per cent., while it increases a rate of one dollar only one per cent. In other words, there seems to be some notion that the express company should have determined accurately what the tax was going to amount

to, and then should have distributed the whole expense on a percentage basis among all its rates. If such a course were proper, its impracticability is apparent; but it is evident that the method adopted by the company is the method contemplated by Congress and the only just course which could have been pursued. Congress has imposed a tax of one cent upon each transaction of shipment. The express company has no right to change the law so as to impose less than one cent upon some shipments and more than one cent upon others. This would entirely negative the intention of Congress that the burden should be equally distributed, for it would result in some shippers paying more and others less than one cent. Besides it is not uncommon for stamp taxes to be imposed without regard to any percentage of value. For example, bank checks require the same stamp, no matter what may be the amount of the check.

The company's course is approved by the language of this court in *Case of The State Freight Tax*, 15 Wall. 232, 274. In that case, the Act imposing a tax on freight expressly authorized companies whose right to tolls was limited by law to add the tax to the amount of their tolls, but did not extend the privilege to companies whose charges for carriage were not thus limited. In speaking of the latter class, the court said at page 274:

> "It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. *They can, therefore, add the tax to the charge for transportation without further authority.*"

The appellant seeks to escape from this difficulty by insisting, that while the new Act purports to be merely an Act to provide revenue, it is really an Act intended by Congress as an Act among other things to regulate or

reduce the rates of express companies. If this were the fact, the Act would be beyond the powers of Congress; for it levies a tax upon all receipts, whether for interstate or intra-state shipments, and thus would attempt to regulate the rates, not only for interstate, but for intra-state, commerce. Such legislation, *quoad* commerce within the states, would doubtless be unconstitutional. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 195; *The Daniel Ball*, 10 Wall, 557, 564; *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557, 564). The court will not readily adopt such an interpretation of the Act, when, if construed as an Act to provide revenue merely, it would be entirely valid.

As this court said in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

The appellant cannot succeed unless it be established that the common-law right of the carrier to freedom of contract has been abrogated by the act. No prohibition in terms is found in the Act itself; but the appellant argues that it must be inferred. A common-law right cannot thus be taken away by implication or inference. It requires a distinct and positive legislative enactment to take away or alter legal rights. In *Arthur* v. *Bokenham*, 11 Mod. 148, 150, the court said:

> "Statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare."

In *United States* v. *Fisher*, 2 Cranch, 358, 390, it was said by MARSHALL, C. J.:

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is

> departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects,"

In *Shaw* v. *Railroad Co.*, 101 U. S. 557, 565, the court said:

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Also *Brown* v. *Barry*, 3 Dallas, 365; *Douglass* v. *Lewis*, 131 U. S. 75, 85.

It is thus apparent that even had the Act in terms imposed the tax exclusively upon the express company, the company might still lawfully relieve itself of the expense by requiring reimbursement from its shippers as a condition of accepting goods for transportation. Whether this be done by exacting a charge made up of two items, or of a single item, is immaterial.

V.

Conclusion.

The answer to the first question certified should be that the War Revenue Act does not impose the tax upon the carrier exclusively, but leaves it to be paid indifferently by either the carrier or the shipper.

The answer to the second question should be in the negative.

Washington, D. C., October Term, 1899.

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William D. Guthrie,
Theodore S. Beecher,
Of counsel for appellee.

No. 248.

Brf. of Steele, Guthrie & Beecher, for

STAMP TAX ON EXPRESS RECEIPTS.

WAR REVENUE LAW OF JUNE 13, 1898.

Appellee

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

Filed Nov. 18, 1899

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 248.

WILLIAM CRAWFORD,
Appellant,

vs.

WILLIAM L. HUBBELL, as Treasurer of the Adams Express Company.

BRIEF FOR APPELLEE ON QUESTION OF JURISDICTION.

CHARLES STEELE,
WILLIAM D. GUTHRIE,
THEODORE S. BEECHER,
Of counsel for appellee.

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BRIEF FOR DEFENDANT.

AS TO THE JURISDICTION OF THE COURT.

This cause, originally commenced in the state court, was removed to the Circuit Court of the United States for the Southern District of New York upon the petition of the defendant upon the grounds hereinafter stated (Removal Papers, p. 1 *et seq.*). A motion to remand was made by the complainant, which was denied (Removal Papers, pp. 31–32), and the cause having been heard on the merits, a decree was entered dismissing the bill. From this decree the complainant appealed to the Circuit Court of Appeals for the Second Circuit, and by that court two questions of law were certified to this court for instructions. Effort was made by counsel in the Circuit Court of Appeals to have the entire record of the cause, including the proceedings on removal, sent up to this court with the certificate; but the effort was unsuccessful. Application was then made to this court for the writ of *certiorari* to bring up the whole record for review, which application was denied. It was thus not due to neglect of counsel that all the proceedings in the cause were not before the court upon the oral argument.

Inasmuch as the attempt below to have all the papers, including the removal papers, certified to this court was unsuccessful, and the subsequent application to this court to have the entire record sent up was denied, it was assumed by counsel that the question of jurisdiction, like the other questions in the case, would be reserved until final hearing of the whole case upon a complete record, and that upon the present hearing, the court would confine its attention solely to the questions certified by the Circuit Court of Appeals for decision. The brief was accordingly confined to the discussion of the questions certified.

It appears from the removal papers that removal was sought by the defendant on three grounds: (1) That the controversy is between citizens of different states; (2) that the cause is one arising under the Constitution and laws of the United States; (3) that the cause arises under the laws of the United States providing internal revenue.

As to the first two grounds, it was insisted that the requisite jurisdictional amount was involved. As to the latter ground, it was urged, in addition, that the right to removal existed independently of the amount involved.

No question can arise but that the controversy was between citizens of different states, for, at the time of the commencement of the suit, the plaintiff was a citizen and resident of the State of New York, and the defendant was a citizen and resident of the State of Connecticut (Removal Papers, p. 1, fol. 3). The circumstance that the defendant was sued in a representative capacity is immaterial (*Whitman* v. *Hubbell*, 30 Fed. Rep. 81; *Baltimore & Ohio R. R. Co.* v. *Adams Express Co.*, 22 Fed. Rep. 404). So it is equally clear that the question is one arising under the Constitution and laws of the United States, for it is

apparent that the plaintiff must succeed or fail according as one or another construction is put upon the War Revenue Act by the court. In *Starin* v. *New York*, 115 U. S. 248, the court said, at page 257:

> "The character of a case is determined by the questions involved. *Osborn* v. *Bank of United States*, 9 Wheat. 737, 824. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

The only questions, therefore, that require consideration are (1) as to the jurisdictional amount involved; and (2) as to whether, in a cause arising under a law providing internal revenue (R. S. sec. 629, subdiv. 4), the amount involved is immaterial.

I.

As to the jurisdictional amount.

The suit is for an injunction restraining the defendant from requiring the plaintiff to pay the stamp tax imposed by the War Revenue Act upon the shipment of express packages. While the tax in the case of the particular shipment which was refused, amounts to but one cent, the relief asked is not merely in respect of that package, but of all packages which the plaintiff will have to ship in the future (Record, p. 7). It is alleged in the bill that the average number of express shipments made by the plaintiff over all the express lines leaving the City of New York is not less than 2,500 per month, and that of these not less than 700 per month have been made over the lines of the Adams Company. The plaintiff further alleges that his business is growing and extending, and that the aggregate number of shipments which he will be

required to make in the regular and ordinary course of his business in the future over the lines of the Adams Company will not be less than it has been in the past. The amount of the tax which the plaintiff would have to pay on Adams Express shipments would thus be at least seven dollars a month or eighty-four dollars a year. The petition for removal alleges that the matter or amount in dispute exceeds, exclusive of interest and costs, the sum and value of $5,000 (Removal Papers, p. 1, fol. 3), and that the number of express packages ordinarily shipped over the Adams Company's lines exceeds 28,000,000 of such packages per year, upon which the tax would amount to more than $280,000 per year. The petition further alleges that the matter or amount in dispute is the value of the right claimed by the Express Company to require the plaintiff and other shippers to provide or pay for the revenue tax; and that the value of such right is more than $280,000 per year (Removal Papers, p. 3).

Upon these allegations, it would seem quite clear that much more than the jurisdictional amount is here involved. If the amount were limited to the mere money value of the plaintiff's right, it would amount to at least $84 a year, and thus in a few years would reach the jurisdictional amount. But in a suit for injunction, it is proper to consider, not only the value of the plaintiff's right, but the value to the defendant of the exercise by him of the right sought to be enjoined; and this not merely as regards the plaintiff, but generally. This right, we have seen, would have a money value of at least $280,000 a year.

The question will be considered, then, from both aspects.

A.

AS TO THE MONEY VALUE OF THE PLAINTIFF'S RIGHT.

As pointed out above, the relief sought is not merely with regard to the particular shipment tendered by the plaintiff and refused by the defendant, but extends to all the business of the plaintiff in the future. There is no limitation as to time, but injunctive protection is asked so long as the law shall remain in existence. The complaint avers that the plaintiff's business is growing and extending, and that the aggregate amount of his shipments in the future will not be less than they have been in the past (Record, p. 4). It cannot be assumed that the law will be repealed; so that we must presume that in the ordinary course of events the business of the plaintiff will continue, and that the burden from which he seeks relief will not be removed or lessened. He will, therefore, be under a continuing expense each year which must ultimately far exceed the jurisdictional amount. This is sufficient for the jurisdiction of the court; for it will not be held that the plaintiff can have no relief until he has suffered damages in a sum greater than the jurisdictional amount.

In *Scott* v. *Donald*, 165 U. S. 107, 115, where the suit was for an injunction to restrain continued and repeated acts of trespass in seizing the plaintiff's property, the court said:

> "Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy by injunction would be of no avail."

In *United States* v. *Freight Association*, 166 U. S. 290, a statute enabling an appeal to be taken to this court "where the *matter in controversy* shall exceed $1,000" was held applicable to an appeal from a decree enjoining

action under an agreement among railroad corporations to establish and maintain rates. The court said (p. 311):

> "A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal."

In *Smith* v. *Whitney*, 116 U. S. 167, on an application for a writ of prohibition to try an officer on charges, the court overruled the objection that it had no appellate jurisdiction, and held that the matter in dispute was whether the officer was subject to a prosecution that might end in a sentence depriving him of salary, which in less than *two years* would exceed the jurisdictional amount. See, also, *Columbian Insurance Company* v. *Wheelright et al.*, 7 Wheat. 534; *United States* v. *Addison*, 22 How. 174.

In the Circuit Courts, it has long been the settled law that the jurisdiction in a suit for injunction is to be determined by the value of the right to be protected, or the extent of the injury to be prevented by the injunction, and not alone by the amount presently involved.

In *American Fertilizing Co.* v. *Board of Agriculture*, 43 Fed. Rep. 609, the suit was to enjoin the Board of Agriculture of North Carolina from enforcing the state tax on fertilizers against the plaintiff, a corporation engaged in the manufacture and sale of fertilizers. The tax imposed on the plaintiff by the terms of the statute was only $500, but in answer to the objection that the amount in controversy was only $500, the amount of the tax imposed, the court said (p. 610):

> "The tax is an annual one, and the value to plaintiff of the injunction cannot be measured by the tax of a single year."

So in *Western Union Tel. Co.* v. *City Council*, 56 Fed. Rep. 419, where also the suit was to enjoin collection of

a license tax of $500 per annum, the court sustained its jurisdiction, saying (p. 420):

> "An injunction in a case like this must be of much greater value to the complainant than the sum immediately demanded."

In *Humes* v. *City of Ft. Smith*, 93 Fed. Rep. 857, where the suit was to enjoin the enforcement of an ordinance imposing a license tax of $75 a month, the court said (p. 862):

> "The defendant insists that the court is without jurisdiction, because the amount in controversy does not exceed the sum of $2,000; that is to say, that the amount which the complainant would have to pay for license to conduct his business does not amount to that sum. Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction."

See, also, *State* v. *Kansas & T. Coal Co.*, 96 Fed. Rep. 353; *Hennessy* v. *Herrmann*, 89 Fed. Rep. 669; *Symonds* v. *Greene*, 28 Fed. Rep. 834.

In *Texas & Pacific Railway Co.* v. *Kuteman*, 13 U. S. App. 99, in a suit by a railroad company to enjoin the institution of a multiplicity of suits to recover back amounts paid in excess of what might lawfully be charged for transportation, the court said in sustaining the jurisdiction of the court (p. 107):

> "The complainant also avers * * that the complainant's right to establish and maintain such rates is a valuable one, and of the value of more than ten thousand dollars * * *An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen.*"

In *Nashville, C. & St. L. Ry. Co.* v. *M'Connell*, 82 Fed. Rep. 65, where the suit was for an injunction against the wrongful use of special contract railroad tickets, it was objected that the suit was substantially upon the ticket contract; that the right of action was

separate upon each ticket, and that such rights or claims could not be joined for the purpose of making up the jurisdictional amount. The court overruled this objection, saying (p. 74):

> "The loss *likely to result in the future* enters into the value of the object of the suit for preventive relief. * * * All damages suffered and *likely to be suffered* are estimated."

It is to be observed that this case is quite different from *Washington &c. Railroad* v. *Dis't of Columbia*, 146 U. S. 227, and similar cases, where the relief asked was only against certain *specified* wrongs which *had already occurred* and which together did not aggregate in value the jurisdictional amount. Here the relief prayed for, is as to the *future* as well as the past. It is to protect the plaintiff's right for all time, and not merely in the specific instance which has already occurred.

Thus, in the Georgetown R. R. Co. case cited above, the prayer for relief was directed only against certain particular taxes which had been already levied, and an injunction was asked to restrain the prosecution of pending actions to *enforce those taxes* or the institution of any other actions to *enforce the same taxes*. The relief asked was thus confined to certain specified taxes already assessed, and the Court said (p. 232):

> "The matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount."

To the same class belong the cases of *Clay Center* v. *Farmers' Loan &c. Co.*, 145 U. S. 224; *New England Mortgage Co.* v. *Gay*, 145 U. S. 123; *Gibson* v. *Shufeldt*, 122 U. S. 27.

So in the case at bar, if the relief demanded had been simply against refusing to accept, without payment of the

tax, the package that had been actually tendered, it might perhaps be plausibly objected that this court could not take into consideration future shipments. But the complaint expressly demands judgment that the company be required "to accept and receive for forwarding and transportation and to forward and transport for the plaintiff *any package or packages* of the kind and character they are accustomed to forward and transport," &c. (Record, p. 7) thus extending the relief asked, beyond the particular instance which had occurred, and embracing all the plaintiff's shipments in the future.

The distinction here suggested was recognized in *Citizens' Bank* v. *Cannon*, 164 U. S. 319, 322, where, in a suit to enjoin the enforcement of payment of taxes for specific years past, the court said:

> "It is argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds two thousand dollars for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years."

The court thus recognized the distinction between a suit involving "taxes for specific years" and a "suit to exempt property from taxation permanently." Had the suit then been of the latter class, the jurisdiction would evidently have been sustained.

B.

AS TO THE VALUE OF THE DEFENDANT'S RIGHT.

But, as already intimated, we are not in a case of this kind confined to a consideration of the benefit that would be derived by the plaintiff from the relief sought. We may look as well at the value to the defendant of the right whose exercise is sought to be enjoined. Where, for

instance, the threatened injury consists in the use by the defendant of specific property, the value of such property rather than the injury produced by the use of such property has been regarded as the matter in dispute. Thus in *Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black 485, where the suit was to abate a railroad bridge as a nuisance, specially injurious to the plaintiff as a proprietor of steamboats, the court said (p. 492):

> "The want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

This decision was, in *Whitman* v. *Hubbell*, 30 Fed. Rep. 81, applied to the case of a suit to restrain the maintenance of an *awning* to the injury of the plaintiff, and the court said:

> "The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff."

So in *Rainey* v. *Herbert*, 3 U. S. App. 592, 600, 628, the same rule was applied to the case of a suit to restrain the erection of *coke ovens*. There the court said at page 600:

> "But the defendant, in an affidavit on file in the cause, has stated that the continuance of the injunction would damage him 'many thousands of dollars.' Now, in *The Mississippi and Missouri Railroad Company* v. *Ward*, 2 Black, 485, 492, which was a suit in equity to abate a nuisance, it was ruled that the want of a sufficient amount of damages suffered by the plaintiff to give the court jurisdiction would not defeat the suit if the value of the object to be attained, namely, the removal of the nuisance, was up to the jurisdictional sum, and in *Market Company* v. *Hoffman*, 101 U. S. 112, the value of the right, the exercise of which was enjoined, was held to be a test of jurisdiction."

Similarly in *Market Company* v. *Hoffman*, 101 U. S. 112, where the suit was to enjoin the proprietor of a market from selling stalls in such market occupied by the com-

plainants, and to establish the right of the complainants to continued occupancy, the amount of the benefit of which the decree in favor of the plaintiff deprived the defendants, was considered for the purpose of determining whether the amount in controversy was sufficient to give this court jurisdiction on appeal. The court said at page 113:

> "The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000. Of this benefit the decree deprives them."

In *Stinson* v. *Dousman*, 20 How. 461, 467, on writ of error to a state court in an action to recover $481 as rent, a sum less than the jurisdictional amount of $1,000, it appeared that the agreement to pay such rent was contained in a contract for the sale of the land, which provided that, in case of failure of the vendee to perform the covenants on his part, the vendor could declare the contract void, and hold the vendee liable for rent, and the court said:

> "The subject of the suit is not merely the amount of rent claimed, but the title of the respective parties to the land under the contract. The contract shows that the matter in dispute was valued by the parties at eight thousand dollars. (*Bennett* v. *Butterworth*, 8 How. 124.) We think this court has jurisdiction."

The court will bear in mind that the express company is a common carrier and as such is bound by law to treat all its patrons alike. An adverse decision in this case,

therefore, would directly determine its right not only as against the plaintiff, but as against all its other shippers. The company could not litigate the question anew. The matter in dispute, therefore, is the company's right to exact the tax, not alone from the plaintiff, but from all its shippers. This right is of the value of at least $280,000 a year. Were the business not thus affected with a public interest, it might well be doubted whether the court could consider the effect of the injunction as between the company and customers other than the plaintiff; but where the question is, as here, a public one, we submit that the defendant's right, not only as against the plaintiff, but against the public as well, is the real matter in dispute.

II.

AS TO THE JURISDICTION IN A CAUSE ARISING UNDER A LAW PROVIDING INTERNAL REVENUE INDEPENDENTLY OF THE AMOUNT INVOLVED.

In the court below the jurisdiction was sustained on the ground that the case was one arising under a law providing internal revenue. The opinion of the court (89 Fed. Rep. 1) did not state, however, that this conclusion was reached independently of the amount involved; and in the subsequent case of *Johnson* v. *Wells, Fargo & Co.*, 91 Fed. Rep. 1, the court there distinguished the decision in the case at bar on the ground that it was evident that here the amount involved was over $2,000, and, therefore, it would be assumed that the court had sustained the jurisdiction on the ground, not only that the question arose under a revenue law, but that the amount involved was over $2,000; and in the *Wells-Fargo* case the court reached the conclusion that there was no right to removal in a case arising under the revenue laws, unless the necessary jurisdictional amount was involved.

It is submitted, however, that the decision in the *Wells-Fargo* case is not sound, and that the correct view is that the circuit courts still have jurisdiction, independently of the amount involved, in a cause arising under a law providing internal revenue, and that such a cause, if begun in the state court, may be removed to the Federal courts.

We should undoubtedly expect to find that Congress had conferred upon the Federal courts jurisdiction to determine all questions arising under the Federal revenue laws. Indeed, it might well be doubted whether any other than a Federal court could have original jurisdiction in such a case. The jurisdiction would seem to differ little in principle from that in the case of admiralty and patent cases, where the Federal jurisdiction is exclusive. No adjudication has been found upon this point, however—probably because no suit was ever before brought in a state court to obtain a construction of a Federal internal revenue law.

By the fourth sub-division of Section 629 of the Revised Statutes of the United States the circuit courts were given original jurisdiction of "all causes arising under any law providing internal revenue, and of all causes arising under the postal laws." It will be observed that the jurisdiction under this sub-division does not depend upon the amount involved, but extends to all causes arising under any law providing internal revenue. It was at one time supposed that this sub-division had been repealed by the Act of March 3, 1875, or the Act of March 3, 1887, defining the jurisdiction of the circuit courts; but it is now well settled in the circuit courts that the fourth sub-division of Section 629 was not repealed, but is still operative.

In *Ames* v. *Hager*, 36 Fed. Rep. 129, it was held that although the first three subdivisions of section 629 had been repealed by the subsequent acts of 1875 and 1887, which covered the subject matter of such subdivisions, yet subdivision 4, the subject matter of which was not so covered, was not so repealed. The court said:

> "The subject-matter of the first three clauses is substantially the same as that of section 11 of the act of 1789, and embraces the *general* jurisdiction of the court. That of the fourth clause (claim) is covered by, and taken from, the act of 1833 (4 St. 632,) and the subsequent clauses from various other statutes conferring *special* jurisdiction. Before the consolidation in the Revised Statutes all these provisions stood and were in force together, and, as to many of them, at least, there was no limitation as to the amount necessary to confer jurisdiction. In the Revised Statutes, they were collected into one section, a clause having been given to each class. The language of the statute was changed, in order to collate and condense, without intending to change the law. In the acts of 1875 and 1887, congress returns substantially to the language of the act of 1789, conferring *general* jurisdiction, and, doing so, is it not reasonable to suppose, that by this return to the language of that act it was intended to embrace the subject-matter only of that act, with respect to limiting the jurisdiction by the amount in dispute? If not so intended, then no suit could be brought under the act of 1875, under either of the clauses subsequent to the third, including suits upon patents for inventions, unless the amount in dispute exceeds $500, and none can now be brought under the act of 1887, unless the amount involved exceeds $2,000."

So in *United States* v. *Shaw*, 39 Fed. Rep. 433, 435, it was held that the act of 1887 "could not, therefore, be held to repeal by implication the jurisdiction over the special subject-matter provided for by subdivision 4 of the same section". And in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. Rep. 533, subdivision 4, was recognized as still in force.

By the second section of the Act of March 3, 1875, a defendant was permitted to litigate in the circuit court by

a removal, any suit which he could have litigated there if it had been originally commenced in that court. In other words, any suit of which circuit courts had original jurisdiction could be removed to those courts if begun in a state court. In the second section of the amendatory Act of March 3, 1887, however, it is provided that those suits are removable to the United States Circuit Court of which the circuit courts are given jurisdiction by the *first section of the act*. Although the Act of 1887 was undoubtedly intended to abridge the jurisdiction of the circuit courts, it does not seem to have contemplated any further limitation of the right of removal than was put upon the jurisdiction.

This view is supported by the case of *Vinal* v. *Continental Const. & Imp. Co.*, 34 Fed. Rep. 228. There the court said, at pp. 228–9, speaking of the Act of March 3, 1887:

> "Under the second section of that act any suit of a civil nature is removable by the defendant of which the circuit courts are given jurisdiction by the first section, and by the first section the circuit courts are given jurisdiction of controversies between citizens of different states in which the matter in dispute is of the requisite sum or value. The act is a slovenly piece of patch-work put upon the act of March 3, 1875; but, reading the original and amendatory acts side by side to discover what has been inserted in and what left out of the original act, the meaning of the changes and their effect seem tolerably plain. The first section of the amendatory act, like the first section of the original act, relates exclusively to the original jurisdiction of the circuit court; and the second section of the amendatory act, like the second section of the original act, relates exclusively to the jurisdiction which may be resorted to by removal. It would seem to be the reasonable meaning of the second section in the amendatory act, like the second section of the original act, to permit a defendant to litigate in the circuit court by a removal, any suit which he could litigate there if it was originally commenced in a circuit court."

It is true that in this decision the court was passing only upon the meaning of the word "jurisdiction," and held that it must be construed to refer to subject-matter merely, and not to personal jurisdiction. The language, however, is broad enough to cover any suit which could have been originally commenced in a circuit court; and it would seem fair to hold that if the circuit courts retain original jurisdiction of revenue cases irrespective of the amount involved, notwithstanding section 1 of the act of 1887, the right to remove such cases should remain similarly unlimited.

Such a construction would certainly be reasonable, and it would avoid the anomalous conclusion that although original jurisdiction is granted to the circuit courts in cases arising under the revenue laws, nevertheless such jurisdiction might be defeated by commencing such a suit in the state court, and a final and authoritative decision as to the construction of a Federal revenue law might thus be rendered by a state tribunal.

Conclusion.

For the considerations above set forth we submit that the cause was properly removed to the United States Circuit Court, and that the jurisdiction should be sustained.

Washington, D. C., October Term, 1899.

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